



Gabriel Williams appeals his convictions of child molesting as a Class B felony<sup>1</sup> and sexual misconduct with a minor as a Class C felony.<sup>2</sup> He claims the court committed reversible error when it rejected his tendered jury instruction. Williams waived any allegation of error by his untimely tender of the instruction, but any error was harmless. Therefore, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

Williams dated Ruth Aiesha Price for a number of years. During their relationship, he occasionally lived with Price and her family. Price had younger siblings in the house, including N.B., who was seven years younger than Williams. When N.B. was about twelve years old, Williams told her to come into his room, pulled out his penis, and told her to suck on it. N.B. complied. Approximately two years later, Williams entered a room where N.B. was sleeping and rubbed her breasts over the top of her clothes.

For those acts, the State charged Williams with child molesting as a Class B felony, and sexual misconduct with a minor as a Class C felony.<sup>3</sup> A jury found Williams guilty of both crimes.

### **DISCUSSION AND DECISION**

Williams asserts the trial court improperly refused his tendered jury instruction. Instruction of the jury is a matter left to the sound discretion of the trial court. *Ham v.*

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<sup>1</sup> Ind. Code § 35-42-4-3.

<sup>2</sup> Ind. Code § 35-42-4-9.

<sup>3</sup> The State also charged Williams with child molesting as a Class A felony, *see* Ind. Code § 35-42-4-3, for an act alleged to involve another of Price's younger sisters, A.B. The jury found Williams not guilty of that charge.

*State*, 826 N.E.2d 640, 641 (Ind. 2005). An abuse of discretion occurs when “the instructions as a whole, mislead the jury as to the law of the case.” *Id.* (quoting *Carter v. State*, 766 N.E.2d 377, 382 (Ind. 2002), *reh’g denied*). We consider the preliminary and final jury instructions together, not in isolation. *Price v. State*, 765 N.E.2d 1245, 1252 (Ind. 2002).

The State asserts Williams waived his argument by failing to object or tender his proposed instruction in a timely manner. We agree. The court met with counsel regarding the final jury instructions after both sides had presented evidence. During that discussion, Williams’ counsel stated: “I don’t have any objections” to the court’s proposed final instructions. (Tr. at 202.) Nor did he tender his proposed instruction or request during that discussion that the court provide an instruction regarding inconsistent testimony from a single witness. Accordingly, Williams waived this allegation of error for appellate review.<sup>4</sup> See *Corbett v. State*, 764 N.E.2d 622, 630 (Ind. 2002) (“If a party is objecting to the *failure to give* an instruction, however, a tendered instruction *is* necessary.”) (emphasis in original).<sup>5</sup>

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<sup>4</sup> Williams asserts the court abused its discretion by refusing his instruction because the court’s only reason for refusing the instruction was “it did not want to add another instruction to the already completed sets of instructions for the jurors.” (Appellant’s Br. at 8.) Williams continues by alleging: “Nothing in the record indicates that, prior to the start of the trial, the attorneys were ever told of the trial court’s rule that instructions would not be considered if copying of the jurors’ packets had already been completed.” (*Id.*) Conspicuously absent from Williams’ brief is any mention of the court’s discussion with counsel at the close of the evidence.

<sup>5</sup> We acknowledge Williams tendered a written instruction before closing arguments. Therefore, technically he complied with the mandate of Trial Rule 51(C): “At the close of the evidence and before argument each party may file written requests that the court instruct the jury on the law as set forth in the requests.” Nevertheless, his tender came *after* the court’s discussion with counsel about the final instructions. Williams’ opportunity to object to the final instructions and tender a proposed instruction was at that meeting, before the court finalized the instructions. We decline to find an abuse of discretion

Waiver notwithstanding, we address whether the court abused its discretion. To determine whether a trial court abused its discretion by declining a tendered instruction, we consider: (1) whether the tendered instruction was a correct statement of the law; (2) whether the evidence at trial supported giving the tendered instruction; and (3) whether other instructions covered the substance of the tendered instruction. *Henson v. State*, 786 N.E.2d 274, 277 (Ind. 2003). Even if a defendant demonstrates his tendered instruction met those three requirements, he is not entitled to reversal unless he can “affirmatively demonstrate that the instructional error prejudiced his substantial rights.” *Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005), *trans. denied* 855 N.E.2d 994 (Ind. 2006).

Williams’ proposed instruction provided:

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement inconsistent with his testimony in this case. Evidence of this kind may be considered by you in deciding the value of the testimony of the witness.

(App. at 81.) Assuming *arguendo* that instruction met the three criteria for a tendered instruction that should have been given by the court, we conclude Williams’ substantial rights were not prejudiced.

The court gave the following Preliminary Instruction:

You are the exclusive judges of the evidence, which may be either witness testimony or exhibits. In considering the evidence, it is your duty to decide the value you give to the exhibits you receive and the testimony you hear.

In determining the value to give to a witness’s testimony, some

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in the trial court’s refusal to reopen that discussion, especially when Williams has provided no explanation regarding why he could not have tendered that instruction, or at least raised the argument, at the appropriate time.

factors you may consider are:

- The witness's ability and opportunity to observe;
- The behavior of the witness while testifying;
- Any interest, bias or prejudice the witness may have;
- Any relationship with people involved in the case;
- The reasonableness of the testimony considering the other evidence;
- Your knowledge, common sense, and life experiences.

You should not disregard the testimony of any witness without a reason and without

[sic] careful consideration. If you find conflicting testimony, you must determine which of the witnesses you will believe and which of them you will disbelieve.

The quantity of evidence or the number of witnesses need not control your determination of the truth. You should give the greatest value to the evidence you find most convincing.

(*Id.* at 97.) While that instruction does not give the precise information contained in Williams' tendered instruction, it makes clear to the jurors that they are to determine what "value" to give to each witness's testimony based on the "behavior of the witness," the "reasonableness of the testimony," and their "knowledge, common sense, and life experiences." (*Id.*) Even without Williams' tendered instruction, most jurors would apply the common sense notion that a person whose story changes over time is probably not telling the truth.

Moreover, in rejecting Williams' instruction as untimely, the court announced: "I'll show defense may argue that point [regarding N.B.'s credibility] but [the instruction] will not be given." (Tr. at 204.) Williams took advantage of that opportunity in closing arguments, when counsel discussed N.B.'s credibility at length:

[N.B.] -- you know, [N.B.] never showed you any real emotion on the witness stand. Well that can be called well, she's very credible. She doesn't really -- you know, I think she broke down in tears at one point

briefly and came out of it and told you her version of all the different things that happened to her by Gabriel Williams. The thing about [N.B.]’s testimony that you have to really think hard about it is this -- by her own admission there were either mistakes in the transcript or there weren’t. She said one thing that she said was mistaken and she changed it and she listened to the tape and came back and said, well I guess it wasn’t a mistake. That is how it was said but I didn’t understand the question and I asked her, well, were there other questions you didn’t understand -- she said, yeah, I didn’t understand a lot of the questions and I asked her were there questions that we asked you throughout the trial that you didn’t understand and she said, yeah. I mean, when she goes back -- if she ever goes back and listens to the tape of this trial how many things that she told you is she gonna say, oh, those were mistaken -- I didn’t understand the question the way it was asked but she never told anybody in a year. She says she told people that there were mistakes made but the detective never said, hey, that transcript is wrong -- there were mistakes in there -- what mistakes? She didn’t stop and say -- you know, a couple times she stopped and said I didn’t understand the questions but she didn’t stop after every question and say I don’t understand them -- explain your question to me. My answer might be a mistake. That’s a credibility question. You heard from Phyllis Sealey and from Aiesha Price -- both of whom told you that they had very close relationships with these girls for their whole lives. These are female cousins and sisters who share things and one of them is dating this man -- still is -- still has a relationship with him and neither of these two girls ever once showed any indication that something was wrong? They never said anything[.] . . . What [N.B.] described to you, what [her] testimony was, what it is that brought us in here today and led to these charges makes no sense logically. We don’t know what [her] motivation was and you can’t guess and I’ll keep telling you that because you want to know I’m certain but you can’t. You can’t take it back there [to the jury room]. It’s not an issue for you. There is nowhere near enough evidence presented to you by the State -- not even close. This’ll be an easy decision for you. Gabriel Williams is not guilty and he’s not guilty because the State’s got a really terrible, weak evidentiary case against him which they do -- a terribly horribly weak evidentiary case -- he’s not guilty because he didn’t do these things. That’s why he’s not guilty. This is not a legal argument. This is the reality. Thank you very much.

(*Id.* at 212-16.) That line of argument was, in essence, the focus of his entire closing.

In light of Williams’ final argument and the common-sense nature of the instruction he tendered, we cannot say the court’s refusal of his instruction prejudiced his

substantial rights. *See, e.g., Patton v. State*, 837 N.E.2d 576, 581 (Ind. Ct. App. 2005) (“In light of that evidence, we cannot say an instruction that Patton had no duty to retreat would have impacted the jury’s verdict.”) Accordingly, we affirm.

Affirmed.

NAJAM, J., and MATHIAS, J., concur.